

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ALEJANDRO FRIXIONE,
 #1045558

Plaintiff,

vs.

HOWARD SKOLNIK, *et al.*,

Defendants.

2:10-cv-01119-RLH-LRL

ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's application to proceed *in forma pauperis* is granted (docket #5). Based on the information regarding plaintiff's financial status in the Application to Proceed *in Forma Pauperis*, plaintiff is required to pay an initial installment of the filing fee pursuant to 28 U.S.C. §1915.

The grant of *in forma pauperis* status adjusts the amount of the filing fee that plaintiff must *prepay* -- plaintiff will be required to prepay an initial installment of \$54.04, instead of having to prepay the full \$350 filing fee for this action. The entire \$350 filing fee will, however, remain due from plaintiff, and the institution where plaintiff is incarcerated will collect money toward the payment of the full filing fee when petitioner's institutional account has a sufficient balance, pursuant to 28 U.S.C. §1915. The entire \$350 filing fee will remain due and payable, and will be collected from plaintiff's

1 institutional account regardless of the outcome of this action.

2 Plaintiff filed a complaint on July 8, 2010 and an amended complaint on September 22,
3 2010. The court now reviews the amended complaint (docket #5-1).

4 **I. Screening Standard**

5 Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a
6 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"
7 "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who
8 is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an
9 arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,
10 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or
11 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a
12 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*
13 *v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

14 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
15 provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
16 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under
17 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,
18 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a "formulaic recitation of the
19 elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief
20 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
21 (2007). "The pleading must contain something more...than...a statement of facts that merely creates a
22 suspicion [of] a legally cognizable right of action." *Id.* In reviewing a complaint under this standard, the
23 court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital*
24 *Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to plaintiff and
25 resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

26 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings

1 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21
2 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). All
3 or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner's claims
4 lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are
5 untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal
6 interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*
7 fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932
8 F.2d 795, 798 (9th Cir. 1991).

9 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
10 complained of was committed by a person acting under color of state law; and (2) that the conduct
11 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689
12 (9th Cir. 2006).

13 **III. Instant Complaint**

14 Plaintiff, who is incarcerated at Southern Desert Correctional Center (“SDCC”), has sued
15 the Nevada Department of Corrections (“NDOC”) (which plaintiff incorrectly refers to as Nevada
16 Department of Prison), SDCC Assistant Warden of Operations (“AWO”) Baca, Lieutenant Burson,
17 Sergeant Bean, and corrections officer Morrin. In count I, plaintiff sets forth the following allegations:
18 on February 10, 2010, he was in his unlocked cell when an unidentified inmate or inmates entered,
19 knocked him to the floor and kicked and punched him for several minutes. When plaintiff regained
20 consciousness, he notified Sgt. Bean, who asked plaintiff to identify his attackers. Plaintiff also brought
21 the incident to the attention of AWO Baca, Lt. Burson and officer Morrin. When plaintiff was unable
22 to identify the attackers, despite several written and verbal requests, he was returned to the general
23 population. Plaintiff was assaulted again and suffered serious injuries, including a broken leg, bruised
24 ribs, kidney pain and bleeding from the mouth. At all times, Baca and Morrin were aware of “all
25 actions, decisions taken.”

26 In count II, plaintiff sets forth the following allegations: after the attacks, on February 15,

1 2010, plaintiff, who is diabetic, submitted a medical kite requesting to be seen for kidney pain and
2 bleeding while urinating. He suffered a panic attack and “was picked up by a medical vehicle and
3 transported to the infirmary,” yet did not receive any treatment. On February 17, 2010, plaintiff
4 requested via kite to be seen for continued aches and pains in his rib cage and back as well as for
5 continued bleeding. It appears the response to that kite was “we do not have treatment for fractured ribs,
6 just rest please.” On February 18, plaintiff requested via kite to be seen for continued aches and pains
7 and for “relief for a diabetic.” Plaintiff claims the response (which is unclear) was again insufficient.
8 Plaintiff claims that defendants failed to protect him and were deliberately indifferent to his serious
9 medical needs, in violation of his Eighth Amendment rights.

10 As an initial matter, while plaintiff names NDOC as a defendant, states and any
11 governmental agency that is an arm of the state are not persons for purposes of § 1983. *See Arizonans*
12 *for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58,
13 71 (1989); *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Hale v. Arizona*,
14 993 F.2d 1387, 1398-99 (9th Cir. 1993) (en banc); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320,
15 1327 (9th Cir. 1991); *Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Flint v. Dennison*, 488 F.3d 816, 824-
16 25 (9th Cir. 2007). Section 1983 claims against states or a governmental entity that is an arm of the state,
17 therefore, are legally frivolous. *See Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989), superseded
18 by statute on other grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).
19 Because NDOC is one of the arms of the State, it is not a person for the purposes of § 1983. *See Doe*,
20 131 F.3d 836; *Black v. Nevada Dept. Of Corrections*, 2010 WL 2545760 at *2 (Slip Copy, June 21,
21 2010, D.Nev.). Accordingly, the claims against NDOC are dismissed with prejudice.

22 Turning to count I, the Eighth Amendment prohibits the imposition of cruel and unusual
23 punishments and “embodies broad and idealistic concepts of dignity, civilized standards, humanity and
24 decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Under the Eighth Amendment, “[p]rison
25 officials have a duty to take reasonable steps to protect inmates from physical abuse.” *Hoptowit v. Ray*,
26 682 F.2d 1237, 1250 (9th Cir. 1982); *see also Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Hearns v.*

1 *Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005); *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001).
2 To establish a violation of this duty, the prisoner must establish that prison officials were “deliberately
3 indifferen[t]” to serious threats to the inmate’s safety. *See Farmer*, 511 U.S. at 834. To demonstrate
4 that a prison official was deliberately indifferent to a serious threat to the inmate’s safety, the prisoner
5 must show that “the official [knew] of and disregard[ed] an excessive risk to inmate . . . safety; the
6 official must both be aware of facts from which the inference could be drawn that a substantial risk of
7 serious harm exists, and [the official] must also draw the inference.” *Farmer*, 511 U.S. at 837; *Gibson*
8 *v. County of Washoe, Nev.*, 290 F.3d 1175, 1187-88 (9th Cir. 200 2; *Jeffers v. Gomez*, 267 F.3d 895, 913
9 (9th Cir. 2001) (*per curiam*); *Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir. 1995). To prove
10 knowledge of the risk, however, the prisoner may rely on circumstantial evidence; in fact, the very
11 obviousness of the risk may be sufficient to establish knowledge. *See Farmer*, 511 U.S. at 842; *Wallis*
12 *v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995). Count I states a claim that the remaining defendants
13 were deliberately indifferent to serious threats to plaintiff’s safety in violation of his Eighth Amendment
14 rights.

15 With respect to count II, a detainee or prisoner’s claim of inadequate medical care does
16 not constitute cruel and unusual punishment in contravention of the Eighth Amendment unless the
17 mistreatment rises to the level of “deliberate indifference to serious medical needs.” *Id.* at 106. The
18 “deliberate indifference” standard involves an objective and a subjective prong. First, the alleged
19 deprivation must be, in objective terms, “sufficiently serious.” *Farmer v. Brennan*, 511 U.S. 825, 834
20 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must act with a
21 “sufficiently culpable state of mind,” which entails more than mere negligence, but less than conduct
22 undertaken for the very purpose of causing harm. *Farmer*, 511 U.S. at 837. A prison official does not
23 act in a deliberately indifferent manner unless the official “knows of and disregards an excessive risk
24 to inmate health or safety.” *Id.*

25 In applying this standard, the Ninth Circuit has held that before it can be said that a
26 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be substantial.

1 Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”
 2 *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06.
 3 “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does
 4 not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does
 5 not become a constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429
 6 U.S. at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v.*
 7 *Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992) (*overruled on other grounds*), *WMX Techs., Inc. v. Miller*,
 8 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish
 9 deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th
 10 Cir. 1990). A prisoner’s mere disagreement with diagnosis or treatment does not support a claim of
 11 deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

12 Delay of, or interference with, medical treatment can also amount to deliberate
 13 indifference. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Clement v. Gomez*, 298 F.3d 898,
 14 905 (9th Cir. 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122,
 15 1131 (9th Cir. 1996); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *McGuckin v. Smith*, 974 F.2d
 16 1050, 1059 (9th Cir. 1992) *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133,
 17 (9th Cir. 1997) (en banc); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). Where the
 18 prisoner is alleging that delay of medical treatment evinces deliberate indifference, however, the prisoner
 19 must show that the delay led to further injury. *See Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at
 20 1060; *Shapley v. Nev. Bd. Of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam).

21 The court finds plaintiff’s allegations in count II implicate his Eighth Amendment rights.
 22 However, with respect to count II, plaintiff fails to set forth any specific allegations regarding any action
 23 or inaction by the current defendants, nor does he name any medical personnel as defendants. The Civil
 24 Rights Act under which this action was filed provides:

25 Every person who, under color of [state law] . . . subjects, or causes to
 26 be subjected, any citizen of the United States. . . to the deprivation of any
 rights, privileges, or immunities secured by the Constitution. . . shall be
 liable to the party injured in an action at law, suit in equity, or other

1 proper proceeding for redress. 42 U.S.C. § 1983.

2 The statute plainly requires an actual connection or link between the actions of the defendants and the
3 deprivation alleged to have been suffered by plaintiff. *See Monell v. Department of Social Services*, 436
4 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has held that “[a] person
5 ‘subjects’ another to the deprivation of a constitutional right, within the meaning of section 1983, if he
6 does an affirmative act, participates in another’s affirmative acts or omits to perform an act which he is
7 legally required to do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588
8 F.2d 740, 743 (9th Cir. 1978). Accordingly, count II will be dismissed. The court will, however, grant
9 leave to file an amended complaint in order to amend count II. If plaintiff files an amended complaint,
10 he must link each named defendant with some affirmative act or omission, that is, he must specifically
11 identify each defendant to the best of his ability, clarify what constitutional right he believes each
12 defendant has violated and support each claim with factual allegations about each defendant’s actions.
13 Again, there can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or
14 connection between a defendant’s actions and the claimed deprivation. *Rizzo*, 423 U.S. 362; *May v.*
15 *Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980); *Johnson*, 588 F.2d at 743. Plaintiff’s claims must be set
16 forth in short and plain terms, simply, concisely and directly. *See Swierkeiwicz v. Sorema N.A.*, 534
17 U.S. 506, 514 (2002); Fed. R. Civ. P. 8.

18 Plaintiff is informed that the court cannot refer to a prior pleading in order to make
19 plaintiff’s amended complaint complete. Local Rule 15-1 requires that an amended complaint be
20 complete in itself without reference to any prior pleading. This is because, as a general rule, an amended
21 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
22 plaintiff files an amended complaint, the original pleading no longer serves any function in the case.
23 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each
24 defendant must be sufficiently alleged. Here, plaintiff must reallege count I and then set forth the factual
25 allegations for count II, if he is able to do so in conformance with this order.

1 **III. Conclusion**

2 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma*
3 *pauperis* (docket #5) is **GRANTED**. Plaintiff **Alejandro Frixione, Inmate No. 1045558**, will be
4 permitted to maintain this action to conclusion without prepayment of the full filing fee. However,
5 plaintiff must pay an initial installment of the filing fee in the amount of **\$54.04**. Plaintiff will not be
6 required to pay fees or costs, other than the filing fee, or give security therefor. This Order granting *in*
7 *forma pauperis* status shall not extend to the issuance and service of subpoenas at government expense.

8 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
9 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
10 Prisoner Litigation Reform Act of 1996.

11 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. §1915, as amended by the
12 Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay the Clerk of
13 the United States District Court, District of Nevada, the **\$54.04** initial installment of the filing fee, if
14 sufficient funds exist in plaintiff's inmate account. Thereafter, the Nevada Department of Corrections
15 shall pay the Clerk of the United States District Court, District of Nevada, 20% of the preceding month's
16 deposits to plaintiff's account (in months that the account exceeds \$10.00), until the full \$350 filing fee
17 has been paid for this action. **The Clerk shall send a copy of this order to Albert G. Peralta, Chief**
18 **of Inmate Services, Nevada Department of Prisons, P.O. Box 7011, Carson City, NV 89702.**

19 **IT IS FURTHER ORDERED** that the Clerk shall **FILE** the amended complaint (docket
20 #5-1).

21 **IT IS FURTHER ORDERED** that that all claims against the Nevada Department of
22 Corrections are dismissed with prejudice. The Nevada Department of Corrections is **DISMISSED** from
23 this action.

24 **IT IS FURTHER ORDERED** that count I of the amended complaint **shall proceed**.

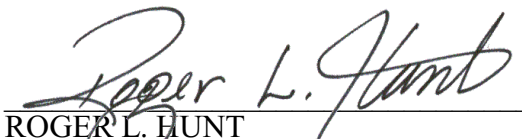
25 **IT IS FURTHER ORDERED** that count II is dismissed with leave to amend in
26 conformance with the instructions provided in this order.

1 **IT IS FURTHER ORDERED** that plaintiff will have **thirty (30) days** from the date that
2 this Order is entered to file his second amended complaint, if he believes he can correct the noted
3 deficiencies. The amended complaint must be a complete document in and of itself, and will supersede
4 the original complaint in its entirety. Any allegations, parties, or requests for relief from prior papers
5 that are not carried forward in the amended complaint will no longer be before the court. **Failure to**
6 **amend will result in the matter proceeding as to count I only.**

7 **IT IS FURTHER ORDERED** that plaintiff shall clearly title the amended complaint
8 as such by placing the words "SECOND AMENDED" immediately above "Civil Rights Complaint
9 Pursuant to 42 U.S.C. § 1983" on page 1 in the caption, and plaintiff shall place the case number, **2:10-**
10 **CV-01119-RLH-LRL**, above the words "SECOND AMENDED" in the space for "Case No."

11 **IT IS FURTHER ORDERED** that the Clerk shall send to plaintiff a blank section 1983
12 civil rights complaint form with instructions along with one copy of the original complaint.

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14
15 DATED this 4th day of October, 2010.

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20 ROGER L. HUNT
21 Chief United States District Judge
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